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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 963

DISTRICT COUNCIL OF PAINTERS No. 16 of ALAMEDA, MARIN, CONTRA COSTA, NAPA, SOLANO, YOLO, PLACER, SACRAMENTO, NEVADA, EL DORADO and SIERRA COUNTIES,

Petitioners,

vs.

PAINTERS UNION LOCAL 127, PAINTERS UNION LOCAL 560, PAINTERS UNION LOCAL 1178, SAM CAPONIO, JAMES L. BROWN, TED CARTY, LEE LOPEZ and MORRIS KOURIE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Respondents in Opposition

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OPINIONS BELOW

The opinion of the District Court (App. A of Petition) is reported at 278 Fed.Supp. 830 (R. 40-48) The opinion of the Court of Appeals for the Ninth Circuit and the concurring opinion (App. B of Petition) are reported at 415 Fed. 2d 1121.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, although it should be noted that no petition for rehearing or for hearing *en banc* was presented to the Court of Appeals.

QUESTIONS PRESENTED

Whether a by-law which vests in delegates to a labor council the right to increase dues of members of the local unions affiliated thereto in any amount below a stated maximum, is violative of section 101(a)(3) of the Labor Management Reporting and Disclosure Act of 1959 (29 USC 401(a)(3)).

STATUTE INVOLVED

The pertinent sections of the Labor Management Reporting and Disclosure Act of 1959, to wit, section 101(a)(3)(A) and (B) (29 USC § 411(a)(3)(A) and (B)) are not fully set forth in the Petition. They are set forth in Appendix A of the Brief in Opposition.

STATEMENT[1]

The Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, is an international labor organization, within the meaning of section 3(i) of the Labor Management Reporting and Disclosure Act of 1959 (29 USC § 402(i))[2] (R. 30) The Brotherhood is governed

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1. The statement of the case is based primarily upon the Agreed Statement of the parties in the District Court. (R. 30-37) As will be pointed out, *infra*, some evidence on which the District Court acted is not in the record before this court, nor before the Court of Appeal.

2. This Act is generally referred to as the Landrum Griffin Act and will be, at times, so referred to in this brief.

by its International officers and a so-called General Executive Board, which handle the affairs of the Brotherhood between conventions of the International, which are held every five years. (Exh. 1; R. 30) The Brotherhood has chartered local unions throughout the United States and Canada. Among them are Local 127, of Oakland, California, Local 560, of Richmond, California, Local 1178, of Hayward, California, and Local 487, of Sacramento, California, all but the latter of which are parties plaintiff to this action.

The Brotherhood also charters District Councils. District Councils are composed of local labor organizations, which operate within the territorial jurisdiction of the District Council. Defendant District Council No. 16, in this case, is chartered by the Brotherhood and has a territorial jurisdiction which covers the Counties of Alameda, Marin, Contra Costa, Napa, Solano, Yolo, Placer, Sacramento, Nevada, El Dorado and Sierra of the State of California. (R. 31)

Under the Constitution of the Brotherhood (Exh. 1; R. 30), all local unions within the territorial jurisdiction of the District Council must be affiliated therewith. (R. 32) Thus, Locals 127, 560, 487 and 1178, which are the local unions involved in this litigation, are affiliated with District Council No. 16.

Under the Constitution of the Brotherhood and the Bylaws of District Council No. 16 (Exh. 2; R. 31), a distinction is made between types of local unions affiliated therewith. Thus, local unions consisting of housepainters have a different status with the District Council than local unions consisting of persons engaged in trades other than housepainting. In the parlance of the Brotherhood, the former are referred to as housepainter local unions and the latter

are referred to as autonomous local unions. Local 487 and plaintiff Locals 127, 560 and 1178 are housepainter local unions.

Each local union affiliated with District Council No. 16 is entitled to send five delegates to the District Council, regardless of the number of members in the local. (R. 32-33) Thus, a local with 1,000 members has the same representation on the District Council as a local having 100 members.

The dues payable by members of housepainter locals to the local union are fixed in the By-laws of the District Council. Thus, under the current By-laws, regular monthly dues payable to the housepainter locals by each of its members were fixed in 1959 at $8.85 per month. (Exh. 2, Article VI, § 6(a))

Ever since 1956, Article VI, § 6(d) of the By-laws have provided that the regular monthly dues for housepainters would be automatically increased by the sum of money equal to the wage increase negotiated for seven hours' work and that such additional payment of dues would commence on the next effective annual date of the contract following the negotiation of the wage increase. (R. 33) In 1962, an amendment to the By-laws gave the delegates to the District Council authority to determine what portion of the increase would remain with the local union, and what portion would go to the District Council, *and to determine whether to waive a part or all of the automatic increase.* (R. 33)[3]

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3. The text of the By-law, as amended, appears in the Petition at p. 4. Its text, showing the old and new language, appears in the opinion of the District Court. (278 Fed.Supp., at pp. 833-34; App. A, Pet., pp. 14-15)

The Landrum Griffin Act provides that subsequent to its effective date, (September 14, 1959), rates of dues, except in the case of federations of national or international labor organizations, may not be increased except as provided in said Act.

Thus, in the case of local labor organizations, dues increases can be accomplished only by "(i) a majority vote by secret ballot of the members in good standing voting at a general or special membership meeting after reasonable notice of the intention to vote upon such questions, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot." (29 USC § 411 (a) (3) (A))

In the case of District Council No. 16, which is a labor organization other than a local labor organization or a federation of national or international labor organizations, dues increases can be accomplished only "(i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by laws of such labor organization: *Provided,* that such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization." (29 USC § 411 (a) (3) (B))

The By-laws of District Council No. 16 do not provide for a convention, regular or special, nor do they give the executive board authority, express or implied, to increase dues. (See Exh. 2)

Effective as of July 1, 1965, Local Unions 127, 478, 560 and 1178, together with other housepainter local unions within District Council No. 16, and elsewhere in the San Francisco Bay Area, negotiated a wage increase equal to 50¢ per hour, or $3.50 per day for a seven-hour day. (R. 34) In January, 1966, delegates to District Council No. 16 voted to apply Article VI, § 6 (d) of the By-laws to increase the rate of dues, and by a vote of 18 to 16, purported to increase the dues of the 4000 painters (R. 32) belonging to its affiliated locals by $1.75 per month to a new rate of $10.60 per month, per member. (R. 34; Exh. 5)

Pursuant to Article VI, § 5 of the By-laws, all housepainter local unions are required to pay a special per capita tax to the District Council for a special fund, at the rate of $3.25 per member, per month. (R. 34) In April, 1966, the delegates to the District Council, applying Article VI, § 6 (d) of the By-laws, purported to increase the special per capita tax by 90¢ per member, per month, to a new rate of $4.15 per member, per month. (R. 34; Exh. 6)

The net effect upon the union member was that he would be required to pay to the local union additional dues at the rate of $1.75 per month, or total dues at the new rate of $10.60 per month, of which $4.15 instead of the previous $3.25, would go to the District Council.

Before instituting this action in the District Court, plaintiffs had exhausted all hearing procedures provided them in the Constitution of the Brotherhood and the By-laws of District Council No. 16 with reference to any grievance or complaint they had with respect to the action of District Council No. 16 (R. 37)

There were two cases in the District Court. In one, the plaintiffs were individual members of Painter Union, Local 487 (R. 1-2) In the other, the plaintiffs in the Amended Complaint were three local unions (No. 127, No. 560 and No. 1178) and certain individual members of these locals. (R. 77-78) The cases were consolidated for trial and an appeal.

There were four causes of action stated in the Amended Complaint. The first sought to enjoin the District Council from enforcing the dues increase of 1.75 per month, per member, upon the ground that the increase was imposed in violation of 29 USC § 411 (a) (3) (A); the second sought to enjoin the District Council from enforcing the increase in the special per capita tax upon the ground that the increase was imposed in violation of 29 USC § 411 (a) (3) (B); the third sought a declaratory judgment, declaring that both increases are illegal and void; and the fourth invoked the pendant jurisdiction of the court to enjoin enforcement of both increases upon the ground that they were imposed in violation of the plain requirements of the By-laws of the District Council and the Constitution of the international brotherhood.

The District Court granted the injunction and declaratory relief sought in the first three causes of action. (R. 49-50) The opinion of the District Court constituted its findings of fact and conclusions of law. (278 Fed.Supp. 830, 831; App.A, Pet. p. 10)

The majority of the Court of Appeals adopted the District Court's opinion as its own and affirmed the judgment below. Judge Merrill of the Court of Appeals concurred in a separate opinion, setting forth a different ground in support of the judgment of the District Court.

ARGUMENT

There are several reasons why this case is not an appropriate one for the granting of a writ of certiorari.

1. Petitioner has not furnished this court with a proper record on which it can act. Althuogh the "Designation of the Record on Appeal" included a "Reporter's Transcript" (R. 33), petitioner did not make any provision for the preparation and filing of such transcript in the Court of Appeals. The Agreed Statement did not contain all the evidence before the District Court, as is apparent from its opinion. The District Court referred to and relied on many exhibits (278 Fed.Supp. 830, 832-34; Pet.App.A, pp. 12, 16), as well as testimony (278 Fed.Supp. 830, 834; Pet. App.A, p. 16) which do not appear in the record.

Missing particularly from the record are the testimony and exhibits relied on by the District Court in findings concerning the critical change in the District Council By-laws in 1962. All parties agreed in the District Court that if the "1962 vote was an 'amendment,' being a vote on whether there should be a power to waive the automatic increase (that would otherwise result) conferred upon the Council delegates, then the 1966 increase is not pursuant to a valid clause increasing the rates of dues of members." (278 Fed.Sup. 830, at p. 834; Pet.App.A., p. 16)

In finding that the vote was, indeed, an "amendment" conferring such power, the court relied on testimony and exhibits which are not in the record before this court. If the testimony and other evidence support the District Court's findings (and there is no claim that they do not), then Petitioner's concession as stated by the District Court would end this case. But Petitioner has not presented, either to this court or the Court of Appeals, any record

to show that it did not make the concession attributed to it by the District Court or that the District Court's finding was not based upon substantial evidence.[4]

For the court to grant certiorari in this case, in view of the foregoing, would be to forget the teachings of *Conway v. California Adult Authority*, ... U.S. .....; 90 Sup.Ct. 312, (October Term, 1969, No. 40) so recently decided.

2. The decision below is not in conflict with the decision of the Court of Appeals for the Second Circuit in *Schwartz v. Associated Musicians of Greater N.Y.*, 340 Fed.2d 228 (1964), as claimed by Petitioner. In the first place, that court did not hold, as Petitioner asserts (Pet. p. 5), that a dues structure basing dues on a percentage of wages conforms to the Act. That issue was not raised. The holding on that aspect of the case was that the plaintiffs in that particular case did not have a right to vote on that dues structure. By failing to question the dues structure, the court may have impliedly approved it. Certainly, however, there is no holding to that effect.

Moreover, the dues structure in the *Musicians* case determined dues by a fixed percentage of earnings. As the District Court demonstrated in this case, there is no fixed percentage determining dues. (278 Fed.Supp. 830, 832; Pet. App.A, p. 12) The factors that determine dues in this case are many, one being the illegal power granted to the delegates to the District Council to increase dues in any amount below a stated maximum. Such a method is clearly different from the method impliedly approved in the *Musicians* case; and it constitutes "a rate fixing authority clearly contrary to the Act." (See Judge Merrill concurring

4. It might also be inferred that lack of a proper record was what motivated the Court of Appeal to follow the unusual course of adopting the District Court's opinion as its own.

in the court below, 415 Fed. 2d at p. 1122; Pet.App.B, p. 21)

Finally, the District Court correctly cited *Schwartz* v. *Associated Musicians, etc., supra,* favorably as a case which *implies* that dues fixed as a constant percentage of wages are lawful. (278 Fed.Supp. 830, 832; Pet. App. A, p. 11)

3. Petitioner claims that the decision below jeopardizes dues structures of many unions which allegedly relate their dues to wages. But the vice of the dues structure in this case is not that dues relate to wages, but that dues can be changed without the procedural protection required by the Landrum Griffin Act. Neither court below suggested that tying dues to wages is, *per se,* a violation of the Act. In fact, as pointed out, *supra,* the District Court opinion cited the *Musicians* cases with approval as cases which "imply that dues fixed as a constant percentage of wages are lawful." (See 278 Fed.Supp. 830, 831; Pet. App.A, p. 11)

Moreover, there is no evidence in this record to indicate how the unions mentioned by Petitioner, in fact, fix their dues (Pet. p. 6) and thus no basis for speculation as to any "dilemma" the decision below poses for them, as conjured up by Petitioner. (Pet. p. 7)

4. Petitioner also claims that the decision below is incorrect because the rate of dues was set before the effective date of the Act. This contention is in patent disregard of the record. As pointed out, *supra,* the critical findings of the District Court invalidating the 1966 increase are based upon evidence of an amendment to the By-laws in 1962 three years after the effective date of the Act.

5. Petitioner's assertion that "the By-law section (in question) specifically relates dues to the hourly wage and to no other factor" (Pet. p. 6) is patently in error. True, by its terms the By-law relates dues increases to hourly

increases in wages. But Petitioner omits the critical additional feature of the By-law that delegates to the Council can determine the increase at any figure within that maximum. It is that power (in this case exercised by 34 men, voting 18 to 16) to determine the increase in dues of 4,000 union members that is fatal to Petitioner's case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS J. MCTERNAN

Counsel for Respondents.

PROOF OF SERVICE

I, FRANCIS J. MCTERNAN, Attorney for Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served three copies of the foregoing Brief For Respondents in Opposition on Joseph E. Smith, Attorney for Petitioners, by mailing said copies via First Class Mail, postage paid, addressed to his office at 405-14th Street, Oakland, California 94612.

Dated this 19th day of February, 1970.

FRANCIS J. MCTERNAN

(Appendix A Follows)

Appendix A

Section 101(a)(3) of the Labor Management Reporting and Disclosure Act of 1959 (29 USC § 401(a)(3) provides as follows:

"(3) *Dues, initiation fees, and assessments.*—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

> "(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or
>
> "(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."